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No. 03-1400

Supreme Court, U.S.
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In The

Supreme Court of the United States

TRAVIS COUNTY, TEXAS, GUSTAVO LUIS "GUS" GARCIA, and CITY OF AUSTIN, TEXAS,

Appellants,

v.

RICK PERRY, Governor of Texas, *et al.*,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Texas

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

Travis County, Gus Garcia, and the City of Austin (collectively, "Travis County appellants") respond to the State's Motion to Affirm.[1]

The State's dismissal argument barely acknowledges the central issue raised here by the Travis County appellants: whether a state may satisfy the constitutional rule of one person, one vote that is at its strictest for congressional districts by blindly relying on the acknowledged legal fiction of inter-censal population stasis, when it voluntarily undertakes mid-decade redistricting for unadulterated partisan purposes. Instead, it devotes considerable space to irrelevancies (such as all of the argument's Part I concerning the mid-decade prohibition issue, State Motion at 8-13),[2] to extended elaborations on matters that are entirely collateral to the issue (such as its lengthy five-paragraph disquisition on the meaning of corrected census numbers, State Motion at 3-4),[3] and to pinched defensive arguments about sub-issues (such as the way burdens of proof shift in the one person, one vote context, State Motion at 13-17).

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[1] The appellees, collectively termed the "State," are the State of Texas itself and its Governor, Lieutenant Governor, Speaker of the House, and Secretary of State.

[2] The one person, one vote argument of the Travis County appellants rests on the Constitution's Article I, section 2, not on Article I, section 4.

[3] The Travis County appellants devote a scant two sentences in a single footnote to the corrected Census number matter – which the State misleadingly suggests means we "focuse[d]" on its reliability, State Motion at 3. The matter was *mentioned*, not argued.

I. The Court's *Cox v. Larios* invalidation of a partisan gerrymander on one person, one vote grounds dictates, with even greater force, the same kind of invalidation of the Texas congressional partisan gerrymander.

Still worse, the State's studied avoidance of the key issue here extends to downplaying the Court's most recent, and significant, decision on the intersection of the one person, one vote doctrine with partisan gerrymandering – *Cox v. Larios*, 124 S.Ct. 2806 (2004) – by burying it in a footnote. *See* State Motion at 16 n.12. The *Cox v. Larios* affirmance came after the Travis County appellants had filed their jurisdictional statement in this appeal. *Cox v. Larios* involved the linkage between the one person, one vote rule and a blatant partisan gerrymander. The fact that the Court deployed a well-ensconced constitutional rule (equal population) to invalidate a constitutionally-frowned upon political ploy (partisan gerrymandering) whose justiciability has proved a source of difficulty for this Court, *see Vieth v. Jubelirer*, 124 S.Ct. 1769 (2004), makes *Cox v. Larios* quite salient here.

In *Cox v. Larios*, the Court summarily affirmed a district court determination that the equal population rule for state legislative districts was violated when the Georgia Legislature tried to hide blatant partisan gerrymandering behind the 10% variance doctrine, *see Larios v. Cox*, 300 F.Supp.2d 1320 (N.D. Ga. 2004). Justice Stevens, joined by Justice Breyer, concurred, 124 S.Ct. at 2806-2809, with a particularly noteworthy observation about the importance of the one person, one vote doctrine in light of the current status of partisan gerrymandering jurisprudence:

> After our recent decision in *Vieth v. Jubelirer* . . . , the equal-population principle remains the only clear limitation on improper districting practices, and *we must be careful not to dilute its strength.*

124 S.Ct. at 2808 (citation omitted) (emphasis added).

The same principle applies to the Texas congressional redistricting now before the Court, but with greater force because of the more restrictive grip of the equal population rule in the congressional context. If the state-acknowledged partisan gerrymander visited upon the thirty-two Texas congressional districts for no reason other than partisan advantage can successfully hide behind the fiction that Texas population had not shifted at all over two years and seven months (from March 2001 to October 2003), then the strength of the one person, one vote rule laid down in *Karcher v. Daggett*, 462 U.S. 725 (1983), has been seriously diluted. If the equal population rule's dilution was not permitted in the partisan gerrymandering context of *Cox v. Larios*, there is no valid reason for permitting its dilution in this case. The State's *ipse dixit* that the congressional plan "complies perfectly with the requirement of population equality," State Motion at 16 n.12, is perfectly false. It did not, and the fact that it did not is plain.

The State belittles the one person, one vote and discard-the-legal-fiction argument of the Travis County appellants by positing that "no court has ever adopted it." State Motion at 7. That is no surprise, since what the State has done in this case is so beyond the bounds of past practices – even past *aggressive* practices – in the rough-and-tumble realm of redistricting. But *Cox v. Larios* edges so close to the argument urged here as to be indistinguishable. Unless the venerable one person, one vote rule is to be relegated to the "silly" category assigned it by one of the

State's key witnesses (and one of the chief architects of the challenged Texas map),[4] the animating principle of *Cox v. Larios* – that improper partisan gerrymandering may be checked by making the one person, one vote rule meaningful – should result in invalidation of the 2003 Texas congressional redistricting plan. If that is a "back-door" way[5] to check this kind of state activity, it at least has the advantage of being firmly grounded in one of the keynote constitutional doctrines of the last century.

II. The legal and evidentiary burden to show a non-discriminatory reason for relying on outdated population numbers shifted to the State, as provided in *Karcher v. Daggett*.

The State simply ignores governing precedent and plain facts in its argument that the Travis County appellants neither shouldered their burden on the one person, one vote issue nor proffered a legal basis for placing the constitutional onus on the State. State Motion at 13-17. *Karcher v. Daggett* speaks directly to the situation.

Unrebutted evidence from the chief demographer for the City of Austin established that the 2000 census populations, allocated among the thirty-two congressional districts, no longer described the population distribution among those districts by the time the Texas Legislature redistricted them in the Fall of 2003. *See* Declaration of Ryan Robinson: Post-Census 2000 Demographic Change in

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[4] Bob Davis, chief map-drawer for the Republicans in the Texas Senate, testified that he thought it "silly" to assume the 2000 census numbers were still accurate in 2003, especially in a state as big as Texas. Trial Tr., 12/18/03.

[5] This is the State's characterization. *See* State Motion at 7.

Texas (attached as Appendix A to State Motion). Robinson explained (with emphasis added):

> The enormous population growth that Texas has witnessed over the last three and a half years has not been homogenously spread across the state. Intra-state migration levels between cities and local household formation rates vary dramatically. Census Bureau estimates data reveal a highly uneven pattern of growth and localized decline. . . . [P]opulation growth is a spatially lumpy phenomenon, and using Census 2000 data to create congressional districts *ensures* that the districts will not be balanced with one another in terms of total population.

This uncontradicted testimony overrides what even the State acknowledges, State Motion at 14, is at best a "presumption" in favor of decennial census data. One of the State's own chief witnesses, Mr. Davis, acknowledged the fact of population shift, in the earlier-referenced testimony about the "silly" fiction.

Furthermore, especially in the context of the partisan gerrymander at the heart of the legislature's action, the demographer's testimony triggers the burden shift explained in *Karcher v. Daggett*. *Karcher* established that only "unavoidable" population variances were permitted among congressional districts. 462 U.S. at 730. If those in the shoes of the Travis County appellants here show that there are differences, and that the differences could have been avoided, the burden then shifts to the state:

> If . . . the plaintiffs can establish that the population differences were not the result of a good

> faith effort to achieve equality, the State must bear the burden to achieve some legitimate goal.

462 U.S. at 731.[6]

The Constitution did not *require* the State to use the stale Census numbers. *Burns v. Richardson*, 384 U.S. 73, 91 (1966) (state legislative case, explaining that the Equal Protection Clause "does not require the States to use total population figures derived from the federal census as the standard by which . . . substantial population equivalency is to be measured").[7] The State's effort here, though, was to simply ignore the equality rule and, instead, rely on the inapposite fiction of decade-long population stasis so that it could achieve its admitted partisan gerrymandering goal. And that goal, as all the members of the Court seem to agree in *Vieth v. Jubelirer*, was illegitimate from its inception (regardless of whether its illegitimacy is justiciable). Thus, the necessary burden-shifting occurred, and the State failed to satisfy its burden. This was, in *Karcher*-derived terms, a "bad faith" effort to achieve equality.

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[6] In the somewhat less restrictive one person, one vote context of state legislative redistricting, the Court has stated that it permits only "minor deviations" that take into account factors that are free from, among other things, "any taint of . . . discrimination." *Roman v. Sincock*, 377 U.S. 695, 710 (1964). Locking in stale population numbers because that is the only way the State could readily enact the redistricting legislation to discriminate against the political party out of power does not meet this standard.

[7] The State has an Office of State Demographer, to which it can turn for reliable and regularly updated population estimates. *See* http://www.txsdc.tamu.edu/tpepp/txpopest.php.

III. The necessary standing exists to press the one person, one vote claim of the Travis County appellants.

The State simply states, without argument, that the City of Austin and Travis County lack standing to press the constitutional claim in this appeal. State Motion at 18. It provides a seemingly specific cite, *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964), as support, but there is nothing in the cited text supporting what the State argues. The Court has reserved this issue from the earliest days of the modern era of reapportionment. *See Baker v. Carr*, 369 U.S. 186, 204 n.23 (1962). There is no reason, however, to try to resolve the question at the jurisdictional statement stage of this appeal. That is because, contrary to the short suggestion at the conclusion of the State's argument, State Motion at 18, Gus Garcia (one of the Travis County appellants) does have standing.

Gus Garcia lives in Travis County, a center of comparatively high population growth in Texas. The county has substantial pieces of three districts – CD 10, CD 21, and CD 25. Given the comparative growth rates across the state, it is appropriate to surmise that the passage of time from the census to enactment of the challenged redistricting plan resulted in each of the three Travis County districts being overpopulated in a comparative sense, meaning that those in them are underrepresented.[8] The

[8] It is particularly inappropriate for the State to hide behind the legal fiction of inter-censal population stability in a context that is the opposite of the reason the fiction was created, then argue that, to even have standing to bring a challenge, a voter must prove in great detail the precise current populations as allocated among the gerrymandered districts. This burden more appropriately rests with the State in the first instance, and a presumption of underrepresentation is warranted

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consequence is that Mr. Garcia did establish standing – and that standing allows him to challenge the entire plan that was enacted. *See, e.g., Larios v. Perdue*, 306 F.Supp.2d 1190, 1209 (N.D. Ga. 2003).

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

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unless the State can prove the facts are otherwise. Additionally, the standing rule of *United States v. Hays*, 515 U.S. 737 (1995), is inapposite in this setting. Unlike in the racial gerrymander context, the representational harm here is in having the state undertake an unforced, blatant statewide gerrymander without bothering to determine current populations with any precision, while simultaneously relying on current political trends. The representational harm reaches all non-Republican residents of the state, or at least those, such as Mr. Garcia, who live in the areas targeted for particularly severe partisan gerrymandering.